RE LEE PEAK SING; EX P MALAYAN BANKING BHD

HIGH COURT SABAH & SARAWAK, SANDAKAN
LEE HENG CHEONG JC
[BANKRUPTCY NOTICE NO: S29-102-2010]
23 JUNE 2011

BANKRUPTCY: *Notice - Final judgment - Bankruptcy Act 1967, s. 3 - Whether summary judgment a final judgment - Dato' Tio Sian Pah v. Alliance Bank Malaysia Berhad*

BANKRUPTCY: *Notice - Setting aside - Application filed after delay of some 60 days - Non-compliance with seven days' statutory requirement - Bankruptcy Rules 1969, r. 94(1) - Whether compliance mandatory - Whether non-compliance mere procedural irregularity - Bankruptcy Act 1967, ss. 93(4) & 131 - Bankruptcy Rules 1969, r. 274 - Sovereign General Insurance Sdn Bhd v. Koh Tian Bee*

WORDS & PHRASES: *"must" - Bankruptcy Rules 1969, r. 94(1) - Application to set aside bankruptcy notice filed after delay of some 60 days - Non-compliance with seven days' statutory requirement - Whether word "must" means compliance mandatory - Whether non-compliance mere procedural irregularity - Bankruptcy Act 1967, ss. 93(4) & 131 - Bankruptcy Rules 1969, r. 274 - Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong*

This was an appeal by the judgment debtor ('JD') against the learned deputy registrar's decision in dismissing his application to set aside the bankruptcy notice ('BN') which was issued against him. The grounds of appeal which arose for consideration were: (i) that the judgment creditor's ('JC') claim against the JD was time barred; (ii) that the seven days' mandatory statutory requirement did not apply to the JD's application to set aside the BN; and (iii) that the judgment obtained against the JD was not a final judgment since it was obtained as a result of a summary judgment application and not based on the merits of the case. The JC's claim, which was filed on 10 November 2008, was based on the letters of guarantee executed by the JD on a demand guarantee and a notice of demand was sent to the JD on 12 February 2008. In respect of the JD's application to set aside the BN, the JD contended that the seven days' mandatory statutory requirement

A could be condoned by the provisions of ss. 93(4) and 131 of the Bankruptcy Act 1967 ('the Act') and r. 274 of the Bankruptcy Rules 1969 ('the Rules'). To oppose this contention, the JC submitted that since the word 'must' was adopted under r. 94(1) of the Rules, the JD's non-compliance with the seven days' B mandatory statutory requirement was fatal. Further, the JD had only sought to oppose the BN after a delay of some 60 days.

Held (dismissing the appeal with costs):

C **(1)** Time only began to run after expiry of seven days after the notice of demand was sent to the JD. Since the amended summons together with the statement of claim was filed on 10 November 2008, the JC's claim which fell under Item 95 of the Sabah Limitation Ordinance (Cap 72) was not time barred as it was filed well within the six years' limitation D period (*Lembaga Pelabuhan Johor v. Panglobal Insurance Sdn Bhd*; refd). (para 3)

(2) Since the word 'must' is employed in r. 94(1) of the Rules, it means that compliance is mandatory. There was an E inordinate delay which was fatal since the JD only sought to oppose the BN after a delay of some 60 days. Hence, an act of bankruptcy had been committed by the JD (*Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong*; refd). (para 3)

F **(2a)** Section 93(4) of the Act deals with non-compliance with normal procedures, while s. 131 of the Act deals with formal defects. These provisions do not apply to non-compliance with a mandatory statutory requirement. Further, r. 274 of G the Rules is only applicable in circumstances involving mere non-compliance with procedural rules and not non-compliance with a mandatory statutory requirement. The JD's non-compliance with the seven days' mandatory statutory requirement was not a mere procedural irregularity H (*Sovereign General Insurance Sdn Bhd v. Koh Tian Bee*; foll). (para 3)

(3) A judgment obtained following a summary judgment application is a final judgment for the purpose of s. 3 of the Act and remains so until and unless it is set aside (*Dato' Tio* I *Sian Pah v. Alliance Bank Malaysia Berhad*; refd). (para 3)

Case(s) referred to:

Affin Bank Bhd v. Tan Sri Kishu Tirathrai [2004] 3 CLJ 350 HC ***(refd)***

Dato' Tio Sian Pah v. Alliance Bank Malaysia Berhad [2010] 1 LNS 275 HC ***(refd)***

Lembaga Pelabuhan Johor v. Panglobal Insurance Sdn Bhd [1997] 2 CLJ Supp 531 HC ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] CLJ (Rep) 219; [1987] 2 CLJ 197 SC ***(refd)***

Noordzi Mohd Ismail v. Bank Bumiputra Malaysia Bhd [1994] 1 CLJ 77 HC ***(refd)***

Patel Holding Sdn Bhd v. Estet Pekebun Kecil Sdn Bhd & Anor [1990] 2 CLJ (Rep) 611; [1990] 2 CLJ 280 HC ***(refd)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(refd)***

Re Woo Yoke San, Ex p OCBC Bank (M) Bhd [2006] 2 CLJ 589 HC ***(refd)***

Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(foll)***

Tee Lian Joo v. Tee Tiong Lian [2009] 8 CLJ 208 HC ***(foll)***

Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor [2000] 4 CLJ 152 HC ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 93(4), 131

Bankruptcy Rules 1969, rr. 94(1), 274

For the appellant/judgment debtor - Sharatha Lincon; M/s Voo & Co

For the respondent/judgment creditor - Nasrinah Jabirin; M/s Fernandez & Co

Reported by Kumitha Abdul Majid

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] This is the appellant/judgment debtor's notice of appeal to judge in chambers dated 6 December 2010, against the learned deputy registrar's decision in dismissing the appellant/judgment debtor's application to set aside the bankruptcy notice issued against him.

Grounds Of Appeal

[2] There are in essence three main grounds of appeal and they are as follows:

(i) That the respondent/judgment creditor's claim against the appellant/judgment debtor is time-barred;

(ii) That the seven days' mandatory statutory requirement does not apply to the appellant/judgment debtor's application (ie, encl. 11) to set aside the said bankruptcy notice; and

(iii) That the judgment dated 12 October 2009 obtained against the appellant/judgment debtor, is not a final judgment.

Consideration Of The Three Main Grounds

[3] (1) As regards ground (i) above that the respondent/judgment creditor's claim against the appellant/judgment debtor is time-barred.

(a) I find that appellant/judgment debtor's contention is an attempt to attack or set aside the judgment or go behind the judgment without going to the appropriate forum or filing the appropriate applications and therefore should not be permitted. I find support in the case of *Tee Lian Joo v. Tee Tiong Lian* [2009] 8 CLJ 208, Vernon Ong Lam Kiat JC (as he then was) held:

> [12] It is settled law that where there is evidence of fraud, collusion or miscarriage of justice a bankruptcy court will look into the validity of a judgment debt (see *Sovereign General Insurance Sdn Bhd* and *Re Khoo Chee Tong, supra*). *Is there any evidence of fraud, collusion or miscarriage of justice? The judgment debtor's contention in this regard is that the interest charged on the gross sum in the BN is erroneous, far excessive and incorrect. It is rather late in the day for the judgment debtor to take up this issue. The sums claimed in the BN are pursuant to the orders dated 20 November 2003 and 17 February 2004. The judgment debtor has not taken any steps to set aside the said orders. The judgment debtor cannot now ask the bankruptcy court to go behind the orders. The judgment debtor is guilty of laches on account of his failure to take any steps to set aside the said orders. In Lee Bak Soon v. RHB Bank Bhd [2008] 1 CLJ*

237 Low Hop Bing JCA speaking for the Court of Appeal said at p 245: "… the JD's failure, refusal or neglect to raise the aforesaid grounds in the proper forum viz either in the civil suit, the auction suit or the Supreme Court case clearly demonstrates a total lack of bona fide on the part of the JD." The Court of Appeal endorsed the principles in *Sovereign General Insurance* and *Re Khoo Chee Tong, supra* where the court dismissed the JD's attempt to set aside the BN on the ground, *inter alia*, that the judgment on which the BN was based was tainted with illegality. (emphasis added)

(b) Further in the case of *Noordzi Mohd Ismail v. Bank Bumiputra Malaysia Bhd* [1994] 1 CLJ 77, KC Vohrah J said:

... In *Halsbury's Laws* (4th edn), vol. 3, this is stated in a passage in para. 273 on the matter of the setting aside of a bankruptcy notice:

On the hearing of the debtor's application to set aside a bankruptcy notice, the courts will not go behind the judgment on which the notice is founded, but is confined to the consideration of the alleged counterclaim, set-off or cross demand in the terms of the statutory provisions relating to it. (emphasis added)

(c) The respondent/judgment creditor's claim against the appellant/judgment debtor is grounded on the letters of guarantee executed by the appellant/judgment debtor on a demand guarantee which means time only begins to run upon demand. The notice of demand dated 5 February 2008 ('the said notice') was sent on 12 February 2008 to the appellant/judgment debtor. Therefore, time in this case, only begins to run after the expiry of seven days after the said notice was sent to the appellant/judgment debtor. The amended summons herein together with the statement of claim was filed on 10 November 2008. As such, the respondent/judgment creditor's claim which falls under Item 95 of the Sabah Limitation Ordinance (Cap 72) is not time barred as it was filed well within the six years' limitation period (see: *Lembaga Pelabuhan Johor v. Panglobal Insurance Sdn Bhd* [1997] 2 CLJ Supp 531 and the Supreme Court's decision of *Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* [1987] 2 CLJ 197; [1987] CLJ (Rep) 219).

A (d) Further in the case of *Patel Holding Sdn Bhd v. Estet Pekebun Kecil Sdn Bhd & Anor* [1990] 2 CLJ 280; [1990] 2 CLJ (Rep) 611, Wan Adnan J (as he then was):

> In my view the judgment had been regularly obtained. *A judgment remains regular and enforceable until it is set aside by the Court. Although the plaintiffs had filed an application to set aside the judgment, the judgment remains regular and enforceable until it is set aside.* Until the judgment is set aside the claim by the first defendant based on the judgment cannot be regarded as a disputed debt. It is in fact an enforceable judgment debt. (emphasis added)

3.2 As regards ground (ii) above that the seven days' mandatory statutory requirement does not apply to the appellant/judgment debtor's application (ie, encl. 11) to set aside the said bankruptcy notice.

(a) The appellant/judgment debtor contended that the seven days' mandatory statutory requirement can be condoned by the provisions of s. 93(4) and s. 131 of the Bankruptcy Act 1967 ("the said Act") and r. 274 of the Bankruptcy Rules 1969 ("the said Rules"). The respondent/judgment creditor however contended that since the word "must" was adopted under r. 94(1) of the said Rules, the appellant/judgment debtor's non-compliance with the seven days mandatory statutory requirement is fatal.

(b) I find that since the word "must" is employed in r. 94(1) of the Bankruptcy Rules, this means that compliance is mandatory. In *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321, Siti Norma Yaakob JCA (as she then was) said:

> The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word "may" implies. *We equate the meaning of the word "must" as that given to the word "shall" and for that reason the choice of the word "must" in the rule does not create the existence of any discretion or empowers the Court to exercise such a discretion.* (emphasis added)

(c) From the facts of this case, the said Bankruptcy Notice was personally served on the JD on the 23 June 2010 but the appellant/judgment debtor only sought to oppose the same by filing encl. 11 after a delay of some 60 days. I find that this inordinate delay is fatal and that an act of bankruptcy had been committed by the appellant/judgment debtor.

(d) In the case of *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277, Lee Hun Hoe CJ (Borneo) speaking for the Supreme Court held that:

> *In the exercise of his jurisdiction in bankruptcy proceedings the learned Judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice it was laid down as early as 1893 that the Court could not go behind the judgment. See In re Easton [1893] 10 Mor 111. Even if there has been an irregularity in the service of the notice of sale it is not open to the respondent in this case to challenge the execution proceedings.* Under s. 3(1)(i) of the Bankruptcy Act 1967 a debtor commits an act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment. *He has seven days after service of the notice to comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set off or cross demand which equals or exceed the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained.* (emphasis added)

(e) I find that s. 93(4) of the Bankruptcy Act deals with non-compliance with normal procedures, while s. 131 of the same Act deals with formal defects. These provisions do not apply to non-compliance with a mandatory statutory requirement.

(f) The appellant/judgment debtor's attempt to rely on his ignorance of the law and/or failure/oversight on his part to instruct his solicitors to file encl. 11 as a ground to justify his non-compliance with the seven days' mandatory statutory requirement and relied on r. 274 of the said

Rules to exonerate him from non-compliance with a mandatory statutory requirement. I find that the appellant/judgment debtor's non-compliance with the seven days' mandatory statutory requirement is not a mere procedural irregularity and that this court is also bound by the decision of the Supreme Court in *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee (supra)*.

(g) Further, I find that r. 274 is only applicable in circumstances involving mere non-compliance with procedural rules and not non-compliance with a mandatory statutory requirement and must again be read in light of the decision of the Supreme Court in *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee (supra)* and the myriad of cases thereafter.

(h) In the case of *Re Woo Yoke San, ex p OCBC Bank (M) Bhd* [2006] 2 CLJ 589, Ramly Ali J (as he then was) said:

> [10] The JD first disputed the sum in the bankruptcy notice under this application (encl. 5) which was filed only on 11 August 2004 *ie, 30 days after the bankruptcy notice was served on the JD and 22 days after the commission of the Act of bankruptcy by the JD. The JD has clearly failed to comply with the requirement under s. 3(2)(ii). No notice was ever given by the JD before he filed his application vide encl. 5. Therefore, the entire grounds is rendered a non-issue and non-starter. Strict compliance with s. 3(2)(ii) of the Bankruptcy Act 1967 is mandatory. Failure of the JD to comply with the said requirements cannot be regarded as merely a procedural irregularity. There are a number of authorities on this point. In Development & Commercial Bank Bhd. v. Datuk Ong Kian Seng* [1995] 3 CLJ 307; the Federal Court held, *inter alia* that:
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> > *the Respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied with proviso (ii) to section 3(2) of the Act, it having been served on the appellant about seven months after the service of the bankruptcy notice on him (the Respondent).* The bankruptcy notice cannot therefore be challenged as to the interest specified therein.

Similarly in *J. Raju M. Kerpaya v. Commerce International Merchant Bankers Bhd.* [2000] 3 CLJ 104, the Court of Appeal held:

> *A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (ii) to section 3(2) of the Act.* Hence, he must, within the time prescribed in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it mistakenly claims an amount larger than that lawfully due.

[11] It was also held in the case of *Re MSA Zachariah, ex parte Boon Siew Finance Bhd.* [1993] 3 CLJ 279, in which T. Selventhiranathan JC (as he then was) referred to the case of *Re Loh Kok Hua, ex parte Ban Hin Lee Bank Bhd. [1991] 3 CLJ 1817; [1991] 3 CLJ (Rep) 183 and held that the JD cannot raise the issue that the Bankruptcy Notice sum is incorrect unless he has given notice to the JC under s. 3(2)(ii) of the Bankruptcy Act 1967 within the stipulated time period.*

[12] *In Dato Loh Fook Yen v. Malayan United Finance Berhad [1989] 1 CLJ 187; [1989] 1 CLJ (Rep) 453, it was held that the notice of dispute had not complied with s. 3(2)(ii) of the Bankruptcy Act 1967 having been delivered eight days after the service of the bankruptcy notice therein, only one day out of the time period stipulated but nevertheless outside the time allowed for payment and therefore the bankruptcy notice is valid.*

[13] *In the premise, the JD's application vide encl. 5 to set aside the bankruptcy notice dated 23 April 2004 can be dismissed with cost, just on this ground alone – ie, failure to comply with requirements under s. 3(2)(ii) of the Bankruptcy Act 1967.* (emphasis added)

3.3 As regards ground (iii) above that the judgment dated 12 October 2009 is not a final judgment.

(a) The appellant/judgment debtor contended that the bankruptcy notice herein was not found on a final judgment as the judgment in this case, was a judgment obtained as a result of a summary judgment application and

not based on the merits of the case. I do not agree with the appellant/judgment debtor's submission on this point for the following reasons.

(b) I am guided by the case of *Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor* [2000] 4 CLJ 152 where VT Singham JC (as he then was) said:

> The real distinction is between, (for want of a better word) what is called, final judgments and orders an interlocutory judgments and orders. In general a judgment or order which determines the principal matter in question is termed "final": see 26 *Halsbury's Laws of England, supra*, para 505, p. 238. *Actually, the use of the term "final" is tautological as all judgments and orders are final. The term ("final") is used for the purpose of distinguishing between judgments and orders and "interlocutory" judgments and orders.* The difference is that judgments and orders which are not termed "interlocutory" judgments and orders are appealable under the new meaning of the word "decision" as defined in s. 3 by the 1998 amendment. In other words, judgments and orders which determine the principal matter in question are termed "final" judgments and orders, and they are appealable. (emphasis added.)

(c) Further in the case of *Dato' Tio Sian Pah v. Alliance Bank Malaysia Berhad* [2010] 1 LNS 275, Nallini Pathmanathan J held:

> *(iv) It is next contended that as there is a pending appeal to the Court of Appeal in respect of the judgment obtained against the Judgment Debtor which has not been disposed of, there is no final judgment obtained by the Judgment Creditor as envisaged in section 3 of the Bankruptcy Act 1967. This contention is flawed. The judgment in the instant case was procured after a summary judgment hearing. It is a final judgment and remains so until and unless it is set aside.* It finally disposed of the rights of the parties, (see *Re Tan Ah Poi; ex p Multi-Purpose Finance Bhd.* [1999] 2 CLJ 694; [1999] 2 MLJ 555; and *Re Tan Hwee Earn; ex p The People's Insurance Co (M) Sdn. Bhd.* [1999] 4 CLJ 325; [1999] 4 MLJ 248). *If indeed the judgment obtained were not a final judgment it would follow that no bankruptcy*

proceedings could be instituted in the commercial world notwithstanding clear default in the repayment of loans, until and unless the Federal Court being the final court of appeal concurred with the judgment. This would lead to complete disarray and chaos in the business world, particularly with regards to banks where efficacy and commercial necessity require that contracts are adhered to and enforced efficiently, not after a lapse of several years, pending the full gamut of appeals throughout every level of the hierarchy of the courts in Malaysia. This contention is misguided and is therefore dismissed outright. (emphasis added.)

(d) Another case is *Affin Bank Bhd v. Tan Sri Kishu Tirathrai* [2004] 3 CLJ 350 and where Abdul Malik Ishak J (as he then was) said:

... (c) In regard to the argument that the summary judgment obtained is not a final judgment. I beg to disagree. The Privy Council in *Haron Mohd Zaid v. Central Securities (Holdings) Bhd* [1982] CLJ 293; [1982] CLJ (Rep) 26) p. 294 (p. 32) had this to say in regard to a final judgment:

> And thus the Malaysian courts treat an order of court giving leave to a plaintiff to sign final judgment as a final order, thus entitling a defendant to appeal to the Federal Court without the necessity of obtaining leave.

Continuing further, the Privy Council said at p. 294 (pp. 33-34) of the report:

> It appears to their Lordships that the Federal Court in *Ratnam v. Cumarasamy* [1962] MLJ 330 and *Peninsular Land Development Sdn. Bhd. v. K. Ahmad* [1970] 1 MLJ 253 and subsequently in *Hong Kim Sui v. Malayan Banking Bhd.* [1971] 1 MLJ 289, *Arumugam Pillai v. Government of Malaysia* [1980] 2 MLJ 283 and *Ng Cheng Yoon v. Mah binti Mat Isa* [1981] 1 MLJ 218, all of which are unanimous, reserved judgments, has established over the years a settled practice of applying Lord Alverstone's test in the *Bozson* case in order to determine whether an order is final or interlocutory. Their Lordships are unable to find any error in this reasoning: on the contrary their

A Lordships feel entitled to say that the test is both sound and convenient. In three of the five cases cited above the appeal was against leave to sign judgment in summary proceedings. Thus the effect of the practice adopted by the Federal Court in such cases is in line with the English practice as established by Statute since 1925. In any event, this being a matter of practice and procedure, their Lordships, in accordance with their practice, will uphold the decision of the Federal Court.

C In *Re Tan Ah Poi, ex p Multi-Purpose Finance Bhd* [1999] 2 CLJ 694, I had occasion to say as follows:

The English Courts have dutifully applied *Salaman's test* (*White v. Brunton* [1984] QB 570). In our beautiful country, our courts have adopted *Bozson*'s test. Two examples need be cited. The first is the Federal Court decision in *Tee Than Song Construction Co Ltd v. Kwong Kum Sun Glass Merchant* [1967] 2 MLJ 205, while the second is the decision of the Privy Council in *Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd* [1982] 2 MLJ 94. In the circumstances, I too am minded to apply *Bozson*'s test. The High Court judgment was a judgment that was decided by way of an appeal from the decision of the sessions court. It finally disposed of the rights of the parties notwithstanding that the appeal proper to the Court of Appeal was still pending. The sessions court heard the case on a full trial basis and dismissed the judgment creditor's claim against the judgment debtor. To reiterate when the High Court in Johor Bahru heard the appeal, it had decided on the rights of the parties and its judgment must therefore be construed as final notwithstanding that the appeal was still pending in the Court of Appeal. This was my judgment and I so hold accordingly.

H (e) It is clear that from the cases of *Dato' Tio Sian Pah v. Alliance Bank Malaysia Berhad (supra), Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor (supra)* and *Affin Bank Bhd v. Tan Sri Kishu Tirathrai* [2004] 3 CLJ 350 that a judgment obtained following a summary

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judgment application is a final judgment for the purpose of s. 3 of the Bankruptcy Act and remains so until and unless it is set aside.

Order

[4] In the premises, I therefore dismiss this appeal with costs to the respondent/judgment creditor.